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Attorney for Defendant
PETER JOSEPH BALLINGER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	No. Cr. S 02-480 WBS
)	
Plaintiff,)	
)	DEFENDANT'S NOTICE AND MOTION FOR
v.)	RELEASE PENDING RESENTENCING;
)	ORDER
PETER JOSEPH BALLINGER,)	
)	
Defendant.)	Date: April 19, 2006
)	Time: 9:00 a.m.
)	Judge: Hon. William B. Shubb

**TO: MCGREGOR W. SCOTT, United States Attorney, and PHILLIP TALBERT,
Assistant United States Attorney:**

PLEASE TAKE NOTICE that on April 19, 2006 at 9:00 a.m., or as soon as the matter may thereafter be heard, defendant PETER JOSEPH BALLINGER, through his counsel, Chief Assistant Federal Defender Linda Harter, will and hereby does move the Court for an order of release.

This notice is based on the Defendant's Motion for Release Pending resentencing.

BACKGROUND FACTS

The defendant, Peter Ballinger, was sentenced on April 28, 2004 following an evidentiary hearing. The Court found that safety valve did not apply and sentenced Mr. Ballinger to the statutory mandatory minimum of 60 months.¹ The defendant's pending motions for a downward departure were not resolved as the Court found the statutory mandatory minimum applied.

Mr. Ballinger self-surrendered on July 21, 2004 to FMC Lexington in Kentucky. He has served approximately 21 months in the custody of the Bureau of Prisons. This does not take into account any credit for good time nor does it take into account any half-way house time that would normally be served during the last 10% (or up to 6 months) of the sentence.

Mr. Ballinger's notice of appeal of his sentence was filed on April 28, 2004. At issue was whether or not this Court erred in its judgement that safety valve did not apply. On April 10, 2006 the Ninth Circuit Court of Appeals concluded that the Government had failed to meet its burden to prove that Mr. Ballinger had been untruthful, that denial of Safety Valve was an error and has remanded the case. See Exhibit B.

Mr. Ballinger is 6'5" tall. At the time he self-surrendered Mr. Ballinger weighed 221 pounds. Since he has been in federal custody his health has steadily deteriorated. He has been hospitalized on at least two occasions. He was last at the hospital at the end of 2005 for 22 days, 10 of those in the ICU. A review of his medical records indicates

¹The Court found that the applicable offense level was 15 and the criminal history category was 1. See page 1 of the Statement of Reasons attached to the Judgement and hereto as Attachment A. The sentencing range at that offense level would have been 18 to 24 months.

1 that at that time he weighed in at 157 pounds.

2 Defense Counsel has expressed concerns about Mr. Ballinger's
3 health since the first day he came into federal custody and counsel
4 learned that there were problems getting him his medications. His
5 first hospitalization was the result of a toxic level of Cyclosporin in
6 his system. This is the medication administered to him by the prison
7 to ensure that his body does not reject his transplanted heart. Mr.
8 Ballinger was transported to the ER at the University of Kentucky
9 Medical Center on February 28, 2005 after he collapsed at the prison.
10 He had been complaining for a few weeks that he was feeling unwell. He
11 was in the hospital until March 23, 2005. He continued to lose weight
12 and was ordered to eat more, however he was not allowed any commissary
13 privileges until July of 2005. In the fall of 2005 he fell ill again
14 and spent 10 days in the ICU and 22 days in University of Kentucky
15 Medical Center. At the end of his stay there he weighed 157 pounds.
16 Mr. Ballinger currently reports that his weight is about 160 pounds but
17 that he is ill again. He reports that the prison medical staff has
18 diagnosed him as "anorexic". Mr. Ballinger is in general population.

19
20 **ARGUMENT**

21 Mr. Ballinger is seeking release pursuant to 18 U.S.C. 3143(a) and
22 18 U.S.C. 3145(c). His appeal has been sustained by the Ninth Circuit.
23 It is likely that at re-sentencing, given the offense level and
24 criminal history finding of the Court as well as his pending departure
25 motions, he will have already served any sentence that the Court is
26 likely to impose. Mr. Ballinger's health raises special concerns.
27 Given his fragile health transportation for re-sentencing in federal
28 custody would present difficulties. Further, if he is transported in

1 custody and placed at the Sacramento County Jail it is likely that his
2 health condition would present problems at the jail. In fact, after he
3 was sentenced in April of 2004 this Court decided that under the
4 circumstances Mr. Ballinger should be allowed to self-surrender.² At
5 that time Mr. Ballinger was in relatively good health for a heart
6 transplant recipient. His medications were in order and he was not ill
7 nor had he been seriously ill since receiving his heart in 2000. Mr.
8 Ballinger did self-surrender to the facility in Kentucky in July 2004.
9 Now his health has greatly deteriorated and there exists even more
10 reason for this Court to allow him to be release from custody pending
11 his re-sentencing.

12 For all of these reasons, the defense respectfully request that
13 this Court order Mr. Ballinger's immediate release from custody pending
14 sentencing pursuant to 18 U.S.C. 3143(a) and 18 U.S.C. 3145(c).

15 Dated: April 14, 2006

Respectfully submitted,

DANIEL J. BRODERICK
Federal Defender

19 /s/ Linda C. Harter
20 LINDA C. HARTER
21 Chief Assistant Federal Defender
22 Attorney for Defendant
23 PETER JOSEPH BALLINGER
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28 ² Mr. Ballinger was released OR at his first appearance in Federal
Court and never failed to make an appearance.

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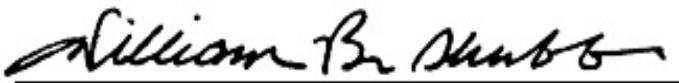
Attorney for Defendant PETER JOSE PETER BALLINGER

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PETER JOSEPH BALLINGER,)	
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)	Judge: Hon. William B. Shubb
Defendant.)	
)	

For the reasons set forth in Defendant's Motion for Release Pending Resentencing and pursuant to 18 U.S.C. §3143(a) and 3145(c). IT IS ORDERED that defendant Peter Joseph Ballinger, Reg. No. 14044-097, be released immediately from the custody of the Attorney General.

IT IS FURTHER ORDERED that the clerk of the Court shall serve this order on the Warden of the Federal Correctional Institute at Lexington, Lexington, Kentucky.


WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

DATED: April 17, 2006